Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

CARL HALFERTY AND J. B. HALFERTY, DOING BUSINESS AS HALFERTY BROTHERS ET AL., PETITIONERS,

VS.

HAWKEYE CASUALTY COMPANY, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND STATEMENT.

The opinion of Judge Otis in the District Court at St. Joseph, Missouri, was handed down April 17, 1942 (R. 115-125). The opinion of the Circuit Court of Appeals was handed down October 29th, 1942, and appears as appendix A herewith. The petition for rehearing was filed within the time allowed by the rules and was overruled November 15.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code as amended by Act of Congress February 13, 1925, Ch. 229, 43 Stat. 938 (28 U. S. C. A. 347).

STATEMENT.

Petitioners are "Motor Carriers" so designated under Art. 8, Ch. 35, Vol. 1, p. 1415, R. S. Mo., 1939, and similarly designated under the Act of Congress respecting Motor Carriers of the Interstate Commerce Act, as such were holders of a certificate of Convenience and necessity from the Public Service Commission of Missouri and the Interstate Commerce Commission.

In 1927, Missouri, as well as other States, had competitive transportation by motor carriers, that for the protection of shippers and other uses of such service, it was necessary that the public safety, convenience and efficiency be safe guarded by proper regulations, it adopted the Article referred to above, as a necessary regulation and under laws intended by the creators to have this result.

Petitioners' young men entered this field about 1935 and promptly complied with said laws by procuring the Bond or Policy of liability insurance, required by Section 5729, *supra,* before receiving such certificate and also complied with 215 of the Act of Congress, which Act requires such Carrier to pay:

> "Any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit or for loss or damage to others."

The community which Halferty Bros. serve is an agricultural and live stock producing country and farmers residing therein needed such service (R. 95) and they hauled anything a farmer has to haul, they had to take care of all his needs (R. 114) and the business would not have been profitable otherwise.

The policy issued in this case Exhibit A, pages 15-65, at page 65, contains among others, the following provisions:

> "W. Statutory Provisions; any and all provisions relating to Section 11 of this policy which are in conflict with the Statutes of the State wherein this policy is issued are understood, declared and acknowledged by the company to be amended to conform to such statutes."

Exhibit "A," Page (17 R.):

> "Coverage a Bodily Injury Liability; to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile."

Page (17 R.):

> "Defense, Interest, Costs And Medical Aid: The company agrees to provide, in the insured name and behalf, a defense to any suit against him, alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent."

The policy is limited to $5,000 for each person and a total of $35,000 as to each accident. Of the several indorsements attached to the policy, at Page (15 R.) and on several others is a stamped indorsement, as follows:

> "The Missouri Public Service Commission indorsement, which is the top indorsement attached to this Policy, takes precedence over any provision of other indorsement attached to this Policy."

Page (41 R.) is the Public Service Commission indorsement referred to.

"Missouri Public Service Commission Endorsement
(Interstate.)

In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby waives a description of the motor vehicles insured hereunder and agrees to pay any final judgment rendered against the assured, for personal injuries, including death resulting therefrom, to all persons, except employes of the assured engaged in the course of their employment and/or damage to property, except property owned by, leased, hired or in the custody and control of the assured caused by any and all motor vehicles operated by the assured pursuant to the Certificate of Convenience and Necessity issued by the Public Service Commission of Missouri, within the limits set forth in the schedule herein; and further agrees that upon its failure to pay any such final judgment, such judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any endorsement thereon nor the violation of any of the provisions thereof by the assured shall relieve the Company from liability hereunder or from the payment of any such final judgment."

Thereafter (page 49 R.) is the endorsement, by which the company attempts to commit "Hara-kiri" upon the whole policy.

Pages 15, 19, 25 and 31 R. show the cash premium of $1,231.81 paid as premium for the policy.

In line with the business Halferty Brothers conducted, their trucks were engaged in September, 1941, by Mr. Daniel O'Connor in harvesting a crop of sargo, grown on his premises and this farm product was taken in bundles and hauled by truck from the land where grown onto the highways and unloaded on another part of the farm, where it was placed in trenches, to be used thereafter as feed for cattle.

The Petitioners also transported water, over the highways from Plattsburg to dampen the sargo in the trenches, to prevent its burning.

On September 19, 1941, one of these trucks was on the highway within the territorial limits of its route and while returning to the Depot in Plattsburg an accident occurred along the highway. From this arose some five actions at law, filed in the Circuit Court, Clinton County, Missouri, in November, 1941, and were against these petitioners (page 83 R.).

Thereafter the Hawkeye Casualty Company on December 20, 1941, filed this action in the District Court of the United States at St. Joseph, Missouri, where, at the hearing, Otis, Judge, construed said policy as providing coverage of these accidents.

Appeal was taken by the Hawkeye Casualty Company to the Circuit Court of Appeals for the Eighth Circuit and on October 29, 1942, Judges Gardner and Riddick filed opinion reversing the findings of Judge Otis and Woodrough filed a dissenting opinion sustaining and affirming Judge Otis.

BRIEF.

By Sec. 5736, Art. 8, Ch. 35, p. 1434, R. S., 1939, the Legislature enacted as follows:

> "It is hereby declared that the legislation herein contained is enacted for the sole purpose of promoting and conserving the interests and convenience of the public, and that no right, privilege, or permit granted or obtained under or by virtue of this article shall ever be construed as a vested right, privilege, or permit; and the general assembly retains full legislative power over, concerning and pertaining to the subject or subjects legislated upon in this article and the power and right to alter, amend or repeal this article at its pleasure."

The Missouri Supreme Court in *State ex rel. Laundry, Inc.*, v. *P. S. C.*, 34 S. W. 2d l. c. 42, held:

> "The Public Service Commission Law of our own state has been uniformly held and recognized by this court to be a remedial statute, which is bottomed on, and is referable to the police power of the state, and under well-settled legal principles, as well as by reason of the precise language of the Public Service Commission Act itself, is to be 'liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.' *State ex rel* v. *Public Service Commission*, 275 Mo. 201, 206, 204 S. W. 497; *State ex inf.* v. *Gas Co.*, 254 Mo. 515, 535, 163 S. W. 854. The rule of liberal construction thus uniformly accorded by this court to the Public Service Commission Law is consonant with the universal rule applicable to similar remedial statutes, which is to the effect that 'laws enacted in the interest of the public welfare or convenience should be liberally construed, with a view to promote the object in the mind of the legislature, by suppressing the mischiefs and advancing the remedy.' 36 Cyc. 1173-1175."

Petitioners respectfully say that in the majority opinion *Trinity Universal Ins. Co.* v. *Cunningham,* 8 Cir., 107 F. 2d 857, 861, is misconstrued and that a very narrow construction is given "pursuant" and that such construction is not intended by said opinion, quoting 861:

> "To construe this phrase as interpreted by appellant would be a strict construction and would not be in conformity with the general intent and purpose of the rules of the Commission contained in the endorsement or rider. A more reasonable and, we think, the proper interpretation is, 'pursuant,' in the sense of 'acting or done in consequence' of the permit of convenience and necessity, and in the prosecution of the business authorized therein. In so far as the certificate of convenience and necessity is concerned it was complete when it recited permission to serve a certain route. It was the business and permit to operate upon a certain route that comprised the certificate of convenience and necessity. It had to do with the nature of the transportation, not with the character of the operation.
>
> "We are satisfied that the provisions of the policy covered any motor vehicles used by the assured in his business within the territory authorized by the certificate of convenience and necessity and while the permit was suspended. And this finding carries out the general purpose of the Missouri Bus and Truck Law and the regulations of the Commission to provide for the protection of the general public in respect to accidents caused by trucks operated in the business for which the permit was issued. See *Sills* v. *Schneider,* 197 Wash. 659, 86 Pac. 2d 203; *City of Detroit* v. *Drivers' Assn.,* 254 Mich. 263, 237 N. W. 61, 74 A. L. R. 1306; *Sandolovich* v. *United States Fidelity and Guaranty Co.,* 142 Misc. 463, 254 N. Y. S. 563; *Hindel* v. *State Farm Mut. Auto Ins. Co.,* 7 Cir., 97 F. 2d 777; *Liberty Mut. Ins. Co.* v. *McDonald,* 6 Cir., 97 F. 2d 497."

The policy or bond in controversy, page 15 to 65 R., is a Missouri contract and as such under the repeated decisions of the Missouri Courts is to be construed by

the laws and decisions of Missouri, and it is respectfully submitted that the Circuit Court of Appeals failed to give credit to

Eric C. v. *Tompkins,* 58 S. Ct. 817, 304 U. S. 64;
Stoner v. *N. Y. Life Ins. Co.,* 61 S. Ct. 336, 311 U. S. 464.

A statutory bond or insurance policy is such that the statute requiring it becomes a part and parcel of the obligation assumed by their makers and, if the statute so provides, it becomes an obligation to be enforced, notwithstanding the omission of the particular obligation in the written instrument, for such statute, the parties are deemed to have had notice and to have contracted accordingly.

Fogarty v. *Davis,* 264 S. W. 879, l. c. 880.
State ex rel. v. *Rubber Mfg. Co.,* 149 Mo. l. c. 212, 50 S. W. 330.
Zellars v. *Surety Co.,* 210 Mo. l. c. 92, 108 S. W. 549.
School District v. *Casualty Co.,* 104 S. W. 2d 319, l. c. 325, 340 Mo. 1070.
State v. *Wipke,* 133 S. W. 2d 354, l. c. 356.
State v. *Vienup,* 147 S. W. 2d 627, l. c. 628.
State v. *Hartford Indemnity,* 143 S. W. 2d 483, l. c. 485.
Aschenbrenner v. *U. S. F. & G. Co.,* 54 S. Ct. 590, l. c. 592, 292 U. S. 80-84.

The Missouri Supreme Court, by Douglass, Judge, in *State ex rel.* v. *Sheible et al.,* 163 S. W. 2d 559, l. c. 560, on July 1st, 1942, thus quotes the law of Missouri:

> "The general rule requires that a bond should be construed to carry into operation the reasonable intention of the parties, and such construction should be given, when it can be fairly done, to support rather than defeat the bond. 11 C. J. S., Bonds, Sec. 40. Furthermore, the rule is established in this State 'where a bond is given in pursuance of a statute, courts will, in enforcing the bond, read into it the

terms of the statute which have been omitted, and will likewise read out of it terms included in it that are not authorized by the statute.' *State* v. *Wipke*, 345 Mo. 283, 133 S. W. 2d 354, 357; *State* v. *Vienup*, 347 Mo. 382, 147 S. W. 2d 627.

"We had a case involving similar doctrines before us in *Forgarty* v. *Davis*, 305 Mo. 288, 264 S. W. 879, 880. In that case the court found that through inadvertence the wrong printed form of bond was used. However, it held that the statutory provisions intended must be read into the bond given, stating: 'The rule in this state is that, in construing a statutory bond, the provisions of the statutes must be read into it and construed as a part of it. "When parties execute a statutory bond they are chargeable with notice of all provisions of the statute relating to their obligation, and those provisions are to be read into the bond as its terms and conditions. * * *."' "

The rulings of the highest courts in Missouri have established the ruling that where there are several provisions in the contract of insurance, in construing it, the insured is entitled to that construction which is most favorable to him and which provides him the greater indemnity.

Mathews v. *Modern Woodmen*, 236 Mo. 326, 342 343, 139 S. W. 151, 155, Ann. Cas. 1912D, 483.

Salamone v. *Prudential Ins. Co. of America*, 103 S. W. 2d 506, l. c. 508.

Dolph v. *Maryland Casualty Co.*, 261 S. W. 330, l. c. 332-333.

Robinson v. *Corum Casualty Co.*, 27 S. W. 2d 49-51.

Machkey v. *Corum Casualty*, 34 S. W. 2d 564.

Heald v. *Aetna Ins. Co.*, 90 S. W. 2d 797.

Repugnant and conflicting clauses on policies as additional provisions are not permitted under the law of Missouri, as such repugnant and conflicting provisions engender ambiguity.

Wheeler v. *M. B. H. A. Assn.*, 157 S. W. 2d 554, l. c. 557.

Hoover v. *National Casualty Co.*, 162 S. W. 2d 363, l. c. 365.

Drucker v. *Eastern Indemnity Co.*, 223 S. W. 989, l. c. 991.

McAlister v. *Life Insurance Co.*, 251 S. W. 98, l. c. 100.

Cave v. *Physicians Indemnity Co.*, 45 S. W. 2d l. c. 908.

Stewart v. *N. A. Acc. Ins. Co.*, 33 S. W. 2d 1005, l. c. 1007.

Koch v. *Menaugh*, 84 S. W. 2d 383, l. c. 385 (1-2).

Davis v. *Mutual Ins. Co.*, 119 S. W. 2d 493 (4).

Williams v. *Union Central*, 291 U. S. 170, 180, 54 S. Ct. 348-352, 78 L. Ed. 711.

Missouri under its legislative control provides in its insurance code the following:

Vol. 1, Sec. 6077, R. S. Mo., 1939, p. 1532, provides, among other things,

> "nothing herein contained shall permit an insurance company to issue policies in violation of other provisions of the insurance laws of this state * * * The superintendent and attorney general are hereby directed to approve for use in this state only policies conforming to the express provisions of the insurance laws of Missouri, and only such words, phrases, figures, terms and conditions of policy forms, riders, endorsements, supplementary or additional terms and provisions affecting policies or agreements for insurance which are specific, certain and unambiguous, to meet the needed requirements for the protection of lives and property of assureds."

Vol. 1, Sec. 6009, R. S. Mo., 1939, p. 1510, provides:

> "In respect to every contract of insurance made between an insurance company, person, firm or association, whether a stock, a mutual, a reciprocal or other company, association or organization, and any person, firm or corporation, by which such person, firm or corporation is insured against loss or

damage on account of the bodily injury or death * * *, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company, if liability there be, shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, or if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation or any part is due or unpaid; occasioned by said casualty."

Vol. 1, Sec. 6010, R. S. Mo., 1939, p. 1510, further provides:

"Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, * * * if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company, person, firm or association as described in the preceding section, and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment."

The "Quizzling" attitude assumed by the Insurance Company is not supported by the laws of Missouri, and the proceedings first filed in the Clinton County Circuit Court are protected by the laws of Missouri, and in the event of an adverse judgment no right is taken away from the Insurance Company by Sec. 60010, R. S. Mo., 1939, p. 1510, as the company has its remedies under that statute.

It is therefore respectfully submitted that there should be no conflict between the Federal Court rules or of the 8th Circuit against the established law of Missouri, nor the rulings of this Honorable Court in that regard.

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